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In The
Supreme Court of the United States

In Re: THE ORAL PETITION OF ANNABELLE C. BARKMAN REQUESTING THAT THE BEDFORD COUNTY BOARD OF ELECTIONS BE COMPELLED TO PERMIT HER TO VOTE IN THE 1998 PRIMARY ELECTION AS A NON-PARTISAN

ANNABELLE C. BARKMAN,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Commonwealth of Pennsylvania's closed primary elections, in combination with the state's restrictive ballot access laws, foreclose any alternative means of access to the primary election ballot or participation in primary elections, for non-partisan voters, to the extent that these laws combine to violate the Voting, Equal Protection, and Associational constitutional rights of an individual registered to vote as a non-partisan?

2. Whether the effective disenfranchisement of over 671,500 registered voters, or ten percent of the registered voter population in Pennsylvania, by the combination of the closed primary system and restrictive ballot access laws unconstitutionally abridge the Fourteenth Amendment's guarantee of Privileges and Immunities of a non-partisan registered voter who wishes to participate in the electoral system?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. The Petitioner's Equal Protection and Due Process Rights Are Violated by Pennsylvania's Statutory Scheme Which Unconstitutionally Burdens Her Participation in Primary Elections 7

A. Pennsylvania's Ballot Access Statutory Scheme Restricts Access to Participation in the Primary Elections 10

B. The Difference Between Connecticut's Ballot Access Law and Pennsylvania's Restrictive Ballot Access Statutory Scheme Places a Greater Burden on the Appellant in the Instant Litigation Than was Placed on the Plaintiff in *Nader*, and Therefore the Constitutional Balancing Test Reveals a Violation of the Plaintiff's Rights 13

II. The Combination of the Effect of the Closed Primary System With Pennsylvania's Regressive Ballot Access Laws Abridges One of Petitioner Barkman's Privileges and Immunities - The Right to Participate in Government Guaranteed by the Fourteenth Amendment 15

A. Petitioner Barkman's Right to Participate in Government is a Constitutionally Protected Privilege and Immunity 20

B. Pennsylvania's Statutory Scheme Denies Barkman the Right to Participate in Government, Thus Violating Her Constitutionally Guaranteed Privileges and Immunities 24

CONCLUSION 26

APPENDIX ..... App. i

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983) 7, 10, 13

Baldwin v. Fish and Game Commission of Montana, et al.,
436 U.S. 371 (1978) 19

Buckley v. Valeo,
424 U.S. 1 (1976) 22, 24

Burson v. Freeman,
504 U.S. 191 (1992) 22

The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughterhouse Company, et al.,
83 U.S. 395 (1 Wall. 36-130)(1872)..... 16, 17

California Democratic Party v. Jones,
984 F. Supp. 1288 (E.D. CA 1997) 14

Corfield v. Coryell,
4 Wash. C.C. 371, Fed Cas. No. 3230 (1825) ... 16, 17

Hague v. Committee for Industrial Organization,
307 U.S. 954 (1939) 18, 22

In Re Kemmler,
136 U.S. 436 (1890) 20

MacDougall v. Green,
335 U.S. 288 (1948) 23

Madden v. Commonwealth of Kentucky,
309 U.S. 83 (1940)..... 20

Maxwell v. Dow,
176 U.S. 581 (1899)..... 17, 18

Moore v. City of East Cleveland,
431 U.S. 494 (1977)..... 21, 23

Nader v. Schaffer,
417 F. Supp. 837 (1976) (D. Conn),
summarily affirmed, 429 U.S. 989 (1976)..... passim

Palko v. State of Connecticut,
302 U.S. 319 (1937)..... 21, 23

Reynolds v. Sims,
377 U.S. 533 (1964)..... 21, 23, 24

Saenz v. Roe,
119 S.Ct. 1518 (1999)..... 19

Supreme Court of New Hampshire v. Piper,
470 U.S. 274 (1985)..... 19

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986)..... passim

Timmons v. Twin Cities Area New Party,
117 S.Ct. 1364 (1997)..... 8, 15

Twining v. New Jersey,
211 U.S. 78 (1908)..... 20

United States v. Cruikshank,
92 U.S. 542 (1875)..... 18, 23, 27

Ward v. Maryland,
12 Wall. 418 (1871) 16

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 24

STATUTES

25 P.S. section 2812 2

25 P.S. section 2872.2 (a) 3, 11

25 P.S. section 2911 (b) 3, 11

CONSTITUTION

U.S. Const. art. IV, section 2 ..... 2, 16, 19, 20

U.S. Const. art. IV, section 4 20

U.S. Const. amend. I ..... passim

U.S. Const. amend. X 20

U.S. Const. amend. XII 20

U.S. Const. amend. XIV ..... passim

U.S. Const. amend. XV 21

U.S. Const. amend. XIX 21

U.S. Const. amend. XXIV 21

U.S. Const. amend. XXVI 21

PETITION FOR A WRIT OF CERTIORARI

Annabelle C. Barkman Petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The order of the Bedford County Court of Common Pleas, with a transcript of the oral proceedings in that Court, is unpublished and is reprinted in the Appendix at App.12 - App. 18. The opinion of the Pennsylvania Commonwealth Court is unpublished and is reprinted in the Appendix at App. 2 - App. 11. The per curiam order denying an appeal to the Pennsylvania Supreme Court is unpublished and reprinted in the Appendix at App.1.

JURISDICTION

The Pennsylvania Supreme Court entered its judgment on July 13, 1999. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. section 1257 (a). Appellate jurisdiction of the Commonwealth Court of Pennsylvania from the Bedford County Court of Common Pleas was a matter of right and was invoked under 24 Pa.C.S.A. section 762. Discretionary jurisdiction in the Pennsylvania Supreme Court was sought under 42 Pa.C.S.A. section 724 (a).

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. section 1257(a).

STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution reads, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Two of Article IV of the United States Constitution reads that:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

25 P.S. section 2812 of the Pennsylvania Statutes reads:

> The qualifications of electors entitled to vote at primaries shall be the same as the qualifications of electors entitled to vote at elections within the election district where the primary is held, provided that no elector who is not registered and enrolled as a member of a political party, in accordance with the provisions of this act, shall be permitted to vote the ballot of such party or any other party ballot at any primary.

25 P.S. section 2872.2 (a) of the Pennsylvania Statutes reads, in part:

> "Minor political party" shall mean a political party as defined in section 801(a) or (b) whose State-wide registration is less than fifteen per centum of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

25 P.S. section 2911 (b) of the Pennsylvania Statutes reads, in part:

> (b) Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two percentum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for. In the case of all other nominations, the number of qualified electors of the electoral district signing such nomination papers shall be at least equal to two percentum of the largest entire vote cast for any officer.

STATEMENT OF THE CASE

This Appeal originated from the Pennsylvania Bedford County Board of Elections' denial of Annabelle C. Barkman's attempt to cast a vote in the primary election held on May 19, 1998.

Petitioner Barkman, registered to vote as a non-partisan, requested that she be permitted to choose from

among the ballots that were available that day, and the local elections board refused to allow her to vote.

Petitioner Barkman then contacted the Bedford County Court of Common Pleas' President Judge, Daniel L. Howsare, who was performing election day duties. The judge conducted a hearing on Barkman's oral petition at which Barkman argued that the denial of her right to vote constituted a violation of her constitutional guarantees, including her right of association, equal protection, and voting rights. Additionally, Barkman argued that the requirement of declaring political preference as a prerequisite to voting in the primary election violated her right to cast a secret ballot. The court concluded that Section 702 of the Pennsylvania Election Code, limiting the right to vote in any party's primary elections to those registered as members of such party, did not violate Barkman's right of free association or right to vote and did not violate the principle of equal protection of the laws.

Barkman then appealed the ruling to the Commonwealth Court of Pennsylvania. In that appeal, Barkman argued that her constitutional rights had been violated because a denial of her right to vote in the primary elections unconstitutionally abridged her voting, associational, and equal protection rights. Barkman argued that this Court's affirmance of a District Court ruling on this issue, *Nader v. Schaffer*, 429 U.S. 989 (1976), did not apply because of the extreme differences between the permissive electoral participatory statutes of Connecticut law (as were examined in the *Nader* case) and Pennsylvania law, which is more restrictive of alternative methods of participating in the primary election system.

The case was argued in the Commonwealth Court on December 8, 1998. Although ruled to be technically moot, the Commonwealth Court declared that the case was one which involved a matter "of important public interest" that was "likely to recur yet escape judicial review" and therefore agreed to review the case. *See* Appendix at App.3.

Addressing Barkman's primary argument that the *Nader* case was inapplicable to the instant case due to the extreme difference between Connecticut and Pennsylvania ballot access law, the Commonwealth Court ruled that the *Nader* case was applicable and rendered a decision adverse to Barkman. The Commonwealth Court's primary response to Barkman's arguments in this regard are located in footnote 5 on page 8-9 of the Opinion. *See* Appendix at App.9.

Barkman filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court on April 12, 1999. The Pennsylvania Supreme Court, by a per curiam Order, denied the Petition for Allowance of Appeal on July 13, 1999. Barkman then filed the instant timely Petition for a Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

671,500 Pennsylvania registered voters - ten percent of the entire registered voter population in the Commonwealth - are prohibited by state law from casting a ballot at the primary elections solely because they are registered to vote as neither members of the Democratic or Republican parties. Close to thirteen million registered voters nationally are disenfranchised in the twenty-five states and the District of Columbia where non-partisan registered voters cannot cast a ballot in primary elections.

Under Pennsylvania law and the laws of these other states, non-partisan registered voters have no rights to participate in the state-sponsored primary election process which produces the candidates for the general election ballot. Like the Petitioner, these registered voters are ignored and shoved aside by the major parties during a primary season paid for by all of Pennsylvania's citizens. Without being able to participate in the primary, many of these registered voters might choose to form their own party, run for office themselves, or petition to place independent candidates onto the primary election ballot - all options which would provide

alternative means by which to participate in primary elections. In Pennsylvania, however, they are prevented by law from exercising any of these options. First, only major political parties are entitled to a primary election ballot spot and gaining position as a major political party has been placed beyond the reach of even the most organized independent party. Second, filing for office as an Independent candidate only allows access to the general election ballot and not the primary election ballot, and the signature requirements are so high even for access to the general election ballot that few independent parties or candidates ever obtain a ballot line for statewide office. Finally, non-partisan registered voters may choose to circulate petitions to run other candidates in the primary election, but under Pennsylvania law, no independent candidates can legally gain a primary election ballot line.

Thus, not only are these registered voters prohibited from voting in the primary election, they have been effectively disenfranchised from participating in the American political system. Across the United States, close to thirteen million voters suffer through this disenfranchisement. In Pennsylvania alone, over 671,500 voters are subjected to this exclusion from participation in the political process.

For these Pennsylvania citizens and for the Petitioner Barkman, the *Nader v. Schaffer* (429 U.S. 989 (1976)) case does not apply. Connecticut is not Pennsylvania. Precisely because Connecticut ballot access law allows a wide variety of independent candidates and parties to participate in the primary elections and to place candidates on the general election ballot; and Pennsylvania has gone to great lengths to eliminate any influence that these individuals or groups would have on the state-sponsored primary election process, Pennsylvania's statutory scheme violates the Fourteenth Amendment rights of Barkman and others similarly situated.

In addition, this combination of laws - which has resulted in the denial of the Petitioner's right of participation

in democratic affairs - infringes on one of Barkman's fundamental privileges and immunities as guaranteed under the Fourteenth Amendment of the United States Constitution - her right to participate in government.

I. The Petitioner's Equal Protection and Due Process Rights Are Violated by Pennsylvania's Statutory Scheme Which Unconstitutionally Burdens Her Participation in Primary Elections.

In *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544 (1986), this Court reiterated the definitive test that must be applied - on a state by state basis - to determine the constitutionality of election laws. In that case, this Court stated that

> constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights.

Id. at 548-49 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 789) (citations omitted).

To determine the extent of the constitutional burden and the adequacy of the State's response in election law cases, courts also use the balancing test developed in *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), in which this Court explained that

> [r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions."

Timmons at 1370.

This type of state specific analysis - closely examining the state electoral law being challenged and determining whether the state's election laws unconstitutionally burden the Plaintiff - was a defining hallmark of the District Court's decision in *Nader v. Schaffer*, 417 F. Supp. 837 (1976) (D. Conn), *summarily affirmed*, 429 U.S. 989 (1976). In that case, the U.S. District Court examined the statute that established Connecticut's closed primary election system, while determining whether the closed primary system infringed on the non-partisan voter's constitutional rights under the First and Fourteenth Amendments.

In that case, the District Court spent a substantial portion of the opinion determining the extent of the burden placed upon the non-partisan registered voter and examining alternative avenues through which the affected Plaintiff could exercise her First and Fourteenth Amendment rights to participate in the electoral system. After holding that the infringement was minimal due to the *ease of access to other means of participation in the electoral process*, this Court held that the regulatory interests advanced by the State

outweighed the minimal infringement of rights imposed on the Plaintiff.

Pennsylvania ballot access laws, however, are fundamentally different than the Connecticut ballot access laws examined in *Nader*. Pennsylvania ballot access laws are among the most regressive in the nation - requiring a new party to register over one million voters to gain primary election ballot access. Pennsylvania ballot access law eliminates the opportunity for non-partisan registered voters to participate in primary elections through the creation of a new party, running as a candidate, or assisting other non-partisan candidates to achieve a ballot spot. Combined with the prohibition on participation in the primary process, the non-partisan or minor party-minded citizen in Pennsylvania has little recourse to the alternative means of electoral participation specifically relied upon by the *Nader* Court - easy access to the ballot and ease of access to nominating candidates and obtaining party status - to find minimal infringement on the Plaintiff's constitutional rights.

As a result of this repressive combination of a closed primary election system with regressive ballot access laws in Pennsylvania, the constitutional burden upon non-partisan registered voters in Pennsylvania is severe. Because the burden on Petitioner Barkman and other non-partisan registered voters is more than incidental - and the *Tashjian* Court has already ruled that all of the supporting interests advanced by the Appellee in this case are insubstantial - the Pennsylvania closed primary statute must be declared to be an unconstitutional infringement on the rights of the Appellant.

A. Pennsylvania's Ballot Access Statutory Scheme Restricts Access to Participation in the Primary Elections

In *Nader*, the District Court devoted a substantial portion of its decision to an examination of Connecticut's ballot access laws in an attempt to fulfill the first prong of analysis established by *Celebrezze* - determination of the "character and magnitude of the asserted injury" to the constitutional rights of the Plaintiff.

The Court reviewed the entire framework established by Connecticut for the operation of the primary and general elections. More specifically, the Court reviewed the process by which major and minor parties, along with non-partisan candidates, gained access to the primary and general election ballots. This analysis formed a substantial portion of the Court's determination that the Plaintiff's rights were only minimally infringed by being prohibited from participating in the primary election process.

Under Connecticut law, candidates of both "major and minor parties" are automatically awarded spaces on the ballot for the general election. *Nader* at 841. To become a major party, a showing of 10% of the vote is required for a particular office, or 20% of the total vote in a gubernatorial election. Major party status grants automatic access to the primary and general election ballot. To become a minor party, all that is required is a showing of 1% of the vote in a gubernatorial election. *Id.* This electoral showing for a minor party automatically qualifies the party for a general election slot, and the minor party may nominate for offices by party convention, without a requirement of the collection of any petition signatures. Non-partisan candidates not nominated by a major or minor party may collect signatures equal to 1% of the votes cast in the last election to achieve a general election ballot line. All of these permissive avenues to the ballot led the *Nader* Court to state that "both minor party

and independent candidates may reasonably anticipate a measure of success in local elections" in Connecticut. *Id.* at 843.

In Pennsylvania, however, only major parties are granted automatic ballot status and major parties are solely defined by the state as any party achieving over 15% voter registration of the entire registered voter population of the state. *See* 25 P.S. 2872.2(a). This results in a requirement for an independent party to register over one million voters under a new party's name to gain a primary election ballot line. Since the highest percentage of registered voters achieved by an independent party in any state at the present time hovers around 3% (by the Alaska Independence Party), it is clear that the threshold established in Pennsylvania is unattainable. The current voter registration numbers for the largest Pennsylvania independent party - the U.S. Taxpayer's Party - also bear out the impossibility of attaining a million registered voters. As of March of 1999, that Party had over 7,000 registered voters, with the next highest being the Reform Party with over 2,000 registered voters.

In addition, under Pennsylvania law, independent political parties can also attain "minor party" status through reception of over 2% of the vote in a general election. Yet minor parties in Pennsylvania, unlike Connecticut, are not awarded either a primary election ballot line or an automatic general election ballot line in the next election - they still must petition and collect over 30,000 signatures of registered voters to participate in the general election in a statewide election. *See* 25 P.S. section 2911 (b). The only advantage granted to a "minor party" versus other political organizations (who have not achieved the 2% threshold) is that the "minor party" is eligible to be listed on State-prepared voter registration forms. Thus, unlike in Connecticut, success at the polls does not result in increased ballot access.

The *Nader* court also went to great lengths to illustrate that minor parties have been successful in

achieving major party status in Connecticut. In the opinion, the *Nader* Court specifically cited the "ease of access to the ballot which the Connecticut statutes provide for parties other than the Republican and Democratic Parties." *Nader* at 843. The Court then went on to cite that nine candidates over the past four years had achieved major party status, that sixty candidacies had achieved minor party status through elections, and that 969 candidates had attained ballot status for the general election. *Id.* at n.5.

As noted above, Pennsylvania ballot access law is much more regressive than the situation examined in Connecticut. Pennsylvania ballot access law prior to 1986 was similar to the Connecticut law examined in *Nader*. However, after the 1986 overhaul which established the high threshold for party status, ***no*** party (besides the Democratic and Republican Parties) has ever achieved "major party" status. Those few parties that have achieved "minor party" status over the past years still do not enjoy any type of parity with the major parties and are still forced to file inordinate numbers of petition signatures to qualify for a general election ballot spot. In addition, regardless of the percentage of the vote a minor party captures, candidates for that party in future elections must still collect the same number of signatures required of candidates who are running for the first time. Thus, a candidate of a new party could obtain 30% of the vote, and the new party would still ***not*** be automatically accorded a primary election or general election ballot line, and would continue to be forced to collect petition signatures to re-qualify for the ballot.

The situation in Pennsylvania is so extreme that House Bill 1918 - the "Voters' Choice Act", was introduced into the legislature in 1998 and in 1999. Although it has not yet been voted upon, the bipartisan co-sponsorship of the Bill reveals support for the legislation. The House Bill would guarantee a ballot line to any party that received over 1% of the general election vote. In addition, the Bill would reduce from 30,000 (approx.) to 4,500 the number of signatures

necessary for ballot access for an independent candidate running for statewide office. Thus, in this manner, even the Pennsylvania legislature has begun to acknowledge that Pennsylvania ballot access laws constitute an undue burden upon the rights of individual electors in the state.

Thus, for non-partisan registered voters such as Barkman, the other avenues of participation in electoral government are closed. The choice presented to Barkman and others similarly situated is either to declare a political preference and participate in the primary elections of the Democratic or Republican Parties, or give up the right to have any voice in which candidates are eventually placed on the general election ballot. Such a choice erodes the fundamental rights of participation in electoral affairs envisioned and guaranteed by the Fourteenth Amendment.

B. The Difference Between Connecticut's Ballot Access Law and Pennsylvania's Restrictive Ballot Access Statutory Scheme Places a Greater Burden on the Appellant in the Instant Litigation Than was Placed on the Plaintiff in *Nader*, and Therefore the Constitutional Balancing Test Reveals a Violation of the Plaintiff's Rights.

This difference between Connecticut and Pennsylvania ballot access laws fundamentally alters the components of the equation used by the *Nader* and *Tashjian* Courts. What was once a minimal infringement in *Nader* has become a significant burden on the Petitioner under Pennsylvania's statutory scheme. Once a significant burden is discovered, the second prong of the test used in *Celebrezze* is also fundamentally altered. No longer must the state only advance "legitimate" goals - it must advance substantial reasons for the support of the closed primary statute.

In *Tashjian*, this Court definitively stated that the interests advanced by the state of Connecticut in support of the closed primary system were insubstantial. In that case, this Court declared that the interests of (1) ensuring the *administrability* of the primary system, (2) preventing voter raiding, (3) avoiding voter confusion, and (4) protecting the responsibility of party government, were not substantial enough to override the fundamental constitutional rights advanced by the Plaintiff in that litigation.

Similarly, in this case, the County Board of Elections has advanced two insubstantial interests - first, that of "preserving the integrity of the electoral process"; and second, that of protecting the associational rights of party members – both interests which fail to outweigh the burden placed upon the Appellant by the Pennsylvania electoral system - that of disenfranchisement by the requirement of declaration of political preference to gain the right to participate in the state-sponsored primary elections.

Given the *Tashjian* Court's elimination of the interests advanced by the Bedford County Board of Elections as being insubstantial, and the showing by the Appellant in this litigation that her constitutional rights have been substantially burdened, this Court is left with one central question: Are the associational rights of the members of the Democratic and Republican parties outweighed by the substantial infringement of the constitutional rights of Barkman and other non-partisan registered individuals?

At least one federal District Court, in a decision recently affirmed by the Ninth Circuit Court of Appeals, in *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. CA 1997), has answered in the affirmative. In that case, four established political parties challenged the passage of Proposition 198, which established an open primary system for the voters of California. The four political parties brought suit, alleging that the associational interests of their members outweighed the interests served by an open primary, and that Proposition 198 was unconstitutional.

The Court, after reviewing the *Tashjian* , *Nader*, and *Timmons* cases, declared that the interests served by an open primary system - enhancing the "democratic nature of the election process and the representativeness of elected officials", opening up the process to "independents and minority party voters", and encouraging "higher voter participation" clearly outweighed the associational rights advanced by the parties. *Id.* at 1301-02. The rights advanced by the parties had included the associational rights of their membership as well as the possibility of voter raiding.

Finalizing its analysis, the Court examined the effect that open primaries have had on the political process in other States, determining that the result has been beneficial to the systems of those states. Finally, in summary, the Court declared that "the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary." *Id.* at 1303.

Thus, the significant burden placed on Barkman, and other similarly situated non-partisan registered voters, clearly outweighs the interests advanced by the state in this case – producing an unconstitutional infringement on Barkman.

II. The Combination of the Effect of the Closed Primary System With Pennsylvania's Regressive Ballot Access Laws Abridges One of Petitioner Barkman's Privileges and Immunities - The Right to Participate in Government Guaranteed by the Fourteenth Amendment

Section One of the Fourteenth Amendment to the United States Constitution reads, in part, that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . .

Through its jurisprudence beginning immediately after the ratification of the Fourteenth Amendment in the *Slaughter-House* cases, this Court has recognized that certain democratic and economic rights are protected as privileges of citizens of the United States.

These rights were first described by early Courts interpreting the Privileges and Immunities language of Article IV, Section Two of the United States Constitution, as extending to

> those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments. .

Corfield v. Coryell, 4 Wash. C.C. 371, Fed. Cas. No. 3,230 (1825).

Although the *Corfield* case did not exhaustively enumerate which rights were protected, the Court declared that general categories of rights were protected by the Clause, including the right to "pursue and obtain happiness and safety"; the "right to acquire and possess property of every kind"; the right to "enjoyment of life and liberty"; and the "elective franchise." This definition was adopted by this Court in *Ward v. Maryland*, 12 Wall. 418 (1871), in which this Court stated that the rights protected "embrace[d] nearly every civil right for the establishment and protection of which organized government is instituted."

In The *Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughterhouse Company, et al.*, 83 U.S. 395 (1 Wall. 36-130)(1872) (the "*Slaughter-House* Cases"), this Court addressed arguments of New Orleans' butchers that the City had granted an unconstitutional monopoly over slaughtering activities to a specific corporation, in violation of the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.

In addressing the alleged violations of the Privileges and Immunities Clause, this Court used the *Corfield* case to further define the nature of the rights protected by that constitutional provision, and declared that citizen privileges included those rights which "owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. For a more definitive listing of those rights, the Court reiterated the scope of the rights enunciated in the *Corfield* decision, by highlighting the "right to peaceably assemble and petition for redress of grievances", the right to "become a citizen of any state of the Union", and the right "to come to the seat of government to assert any claim he may have upon that government." *Id.* at 80.

The dissent to the *Slaughter-House* opinion, written by Justice Bradley, explained that the rights contemplated by the Privileges and Immunities Clauses were rights classified as "fundamental", which included those rights "wrested from English sovereigns at various periods". *Id.* at 114. Blackstone classified these rights under three headings: "the absolute rights of individuals", the "right of personal liberty", and the "right of private property." Justice Bradley concluded by declaring that the privileges of the English people were those rights the violation of which would "produce a revolution in an hour," *Id.* at 115 and that the American Revolution was produced by "taxation without representation" which was "subversive of free government." *Id.*

This Court, in *Maxwell v. Dow*, 176 U.S. 581 (1899), adopted the *Corfield* and *Slaughter-House* declarations and continued to define the scope of a citizen's privileges and immunities by stating that protected rights included

> those [] privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.

Maxwell at 594 (*citing United States v. Cruikshank*, 92 U.S. 542 (1875)).

Among the rights enumerated in *Maxwell* as being protected by the Fourteenth Amendment's Privileges and Immunities Clause were "the right to come to the seat of government to assert claims"; the right of free access "to the courts of justice"; the right "to peaceably assemble and petition for a redress of grievances", and the right "to become citizens of any state." *Maxwell* at 591.

In *Hague v. Committee for Industrial Organization*, 307 U.S. 954 (1939), this Court had another opportunity to further define the rights which were protected by the Privileges and Immunities Clause. In that case, this Court addressed the question of whether the "freedom to disseminate information concerning the National Labor Relations Act, [and] to assemble peaceably for discussion of the Act" was a privilege or immunity of a citizen secured against abridgement by the state under the Fourteenth Amendment. *Id.* at 962. In holding that these rights were protected, this Court quoted from the *Cruikshank* case, in which this Court explained that

> [t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs to petition for a redress of grievances.

Id. at 963 (*quoting United States v. Cruikshank*, 92 U.S. 542 (1875)).

This Court further explained that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Id.* This Court concluded by adding that "it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects." *Id.*

Contemporary jurisprudence of this Court which narrowed the interpretation of the Privileges and Immunities Clause when applied to discrimination by States against non-residents where economic interests were prejudiced, continued to outline the contours of which rights were protected by the Clause. In *Baldwin v. Fish and Game Commission of Montana, et al.*, 436 U.S. 371 (1978), this Court explained that the "pursuit of common callings", "the ability to transfer property" and "access to the courts. . . constituted basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." *Id.* at 1863. In a strong statement aimed at ensuring that the Privileges and Immunities Clause is given an expansive reading, this Court has also declared that "[t]he Court has never held that the Privileges and Immunities Clause protects only economic interests." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 (1985).

In this Court's most recent interpretation of the rights protected by the Privileges and Immunities Clause, *Saenz v. Roe*, 119 S.Ct 1518 (1999), this Court declared that the "right to travel" is a right protected by the Privileges and Immunities Clause of the Constitution. In its opinion, this Court explained that the foundation of this right was established by both Article IV, section 2 and the Fourteenth Amendment to the Constitution and that the right was central to the existence of the Union and is a core privilege and immunity of any citizen of the United States.

A. Petitioner Barkman's Right to Participate in Government is a Constitutionally Protected Privilege and Immunity.

The fundamental core right of participation in government - a bundle of individual rights "arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States", *In re Kemmler*, 136 U.S. 436, 448 (1890); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 92 n.21 (1940), has been denied to Petitioner Barkman due to Pennsylvania's statutory scheme which infringes upon several of the constituent constitutional components which comprise the right to participate in government. These constituent components of a citizens' right to participate in government have been consistently recognized by the jurisprudence of this Court for well over a century.

The right to participate in government is inherently constructed of subsidiary rights which are protected by the textual guarantees of the United States Constitution. These include the free elections for federal representatives and passage of legislation envisioned and guaranteed by Article I, the qualifications of officeholders established by Article II, the Privileges and Immunities guaranteed by Article IV, section 2, and the guarantee of a Republican Form of Government guaranteed by Article IV, section 4.

The Amendments to the Constitution, originating as the Bill of Rights in the first ten Amendments, further define the component constituents of the right to participate in government. These include the right to freedom of speech, assembly, and petitioning of the Government for a redress of grievances guaranteed by the First Amendment; the securing of rights to the people in the Tenth Amendment; the direct election of President and Vice President guaranteed by the Twelfth Amendment; the Privileges and Immunities

protected by the Fourteenth Amendment; the right to vote guaranteed by the Fifteenth, Nineteenth, Twenty-Fourth, and the Twenty-Sixth Amendments; and the direct election of U.S. Senators protected by the Seventeenth Amendment.

The fundamental status conferred on these rights by this Court flow from their privileged existence within the text of the Constitution and from the understanding that these privileges of citizenry "lie at the base of all our civil and political institutions." *Palko v. State of Connecticut*, 302 U.S. 319 (1937) and form the "basic values that underlie our society." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). This Court has broadly construed the core constitutional rights which comprise the right to participate in government; which include the right to vote, to speak freely, to peaceably assemble, to petition for redress of grievances, to run for elected office, and to support candidates for elected office.

The right to vote has been interpreted to include the recognition that all qualified voters have a constitutionally protected right to vote; and that the right to vote cannot be denied outright, nor destroyed by alteration of ballots, nor diluted. *Reynolds v. Sims*, 377 U.S. 533 (1964). This Court has pronounced that

> [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and restrictions on that right strike at the heart of representative government. . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.

Id. at 555, 563.

This Court has also declared that "each and every citizen has an inalienable right to full and effective

participation in the political processes of his State's legislative bodies." *Id.*

In like manner, the First Amendment's protection of free speech "has its fullest and most urgent application to speech uttered during a campaign for political office." *Burson v. Freeman*, 504 U.S. 191 (1992). In *Buckley*, this Court pronounced that

> [d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government, established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 14 (1976).

The Court also restated its' evaluation that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs" and that the "ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley* at 14-15. This Court has most broadly protected these First Amendment rights by guaranteeing protection to public forums used for political expression, declaring that "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

The right of a people to peaceably assemble and to petition the Government for redress of grievances has also been broadly construed on the basis that

> [t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, 92 U.S. 588, 591 (1875).

The *Cruikshank* Court explained that the right of people to peaceably assemble

> always has been one of the attributes of citizenship under a free government[and that i]t derives its source. . . from those laws whose authority is acknowledged by civilized man throughout the world. It is found wherever civilization exists.

Id. See also Palko v. State of Connecticut, 302 U.S. 319, 324 (1937); *Moore v. City of East Cleveland*, 431 U.S. 494, 500-502 (1977).

No one would argue that the ability to run for federal and state office and the ability to support a candidate of one's choice are not rights fundamental to preservation of a republican form of government. This Court has declared that "[f]ree and honest elections are the very foundation of our republican form of government . . . [t]he theme of the Constitution is equality among citizens in the exercise of their political rights." *Reynolds v. Sims* at 564, n. 41 (*quoting MacDougall v. Green*, 335 U.S. 288, 290 (1948) (Douglas, J., dissenting).

Secured together, this litany of fundamental rights recognized as the right to participate in government, has been specifically delineated by this Court as a right guaranteed to individual citizens as a Privilege of citizenship under the Fourteenth Amendment. In *Reynolds*, this Court declared that

> representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.

Reynolds at 565.

In addition, this Court held in *Buckley* that restrictions on amounts spent by candidates themselves, or by individuals independent of candidates - in support of candidacies - violated First Amendment rights. 424 U.S. 1. Clearly, the disenfranchisement of non-partisan registered voters in the threshold primary elections - combined with Pennsylvania's regressive statutory scheme governing other avenues of participation in government - eliminates this fundamental right to "full and effective participation" in political processes.

B. Pennsylvania's Statutory Scheme Denies Barkman the Right to Participate in Government, Thus Violating Her Constitutionally Guaranteed Privileges and Immunities

Pennsylvania statutes eliminating Petitioner Barkman's right to participate in the state-sponsored electoral system, her right to run for office, and her right to support other candidates for office combine to violate her constitutionally-guaranteed fundamental right to participate in government. The crucial keystone of the right to vote secures the other rights that constitute this fundamental right to participate in government. As this Court has previously declared, the political franchise is fundamental because it is "preservative of all rights." *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886).

Pennsylvania's statutory scheme, taken together, unconstitutionally eliminates or burdens Barkman's right to participate in government. Although individually each of these infringements may be constitutionally permissible, an aggregation of burdens upon her right to participation renders Pennsylvania's statutory scheme governing elections violative of constitutional guarantees.

Having been prohibited from participating in the state-sponsored and financed primary elections, Petitioner Barkman would normally have other options available through which to participate in state and federal government, all of which are also individually constitutionally protected avenues of participation. First, Barkman could choose to run for office herself by collecting signatures necessary to place herself on the primary election ballot. Second, she could lead an initiative/referendum process to allow participation of non-partisan registered voters in Pennsylvania's primary elections and to enlarge access to Pennsylvania's general election ballot. Finally, Barkman could form a political party independent of the Republican and Democratic Parties and offer citizens the opportunity to vote in the primary elections for candidates duly nominated by this new party.

In Pennsylvania, however, these options have been foreclosed - thus eliminating Barkman's fundamental right to participate in state and federal government. Running as a non-partisan candidate in Pennsylvania eliminates the candidate's right to participate in the primary elections, and only guarantees a ballot line for the general election - after the collection of tens of thousands of signatures of registered voters. Under Pennsylvania law, this holds true for non-partisan candidates for both state and federal elected office.

Barkman's possible choice to engage in an initiative/referendum process to enable non-partisan registered voters to participate in primary elections and to enlarge ballot access in the general election is also an impossibility under Pennsylvania law. Pennsylvania's lack of a statutory process for initiative/referendum voids this

possibility of Barkman's participation in altering the system to accommodate non-partisan registered voters.

Finally, Barkman would normally be empowered to form another political party, which could then run candidates for the primary elections. In Pennsylvania, however, this option is also an impossibility, due to the prohibition placed on political parties other than the Republican and Democratic parties from placement on the primary election ballots. Access to "major party" status - and equal rights with the two major political parties - requires the registration of fifteen percent (15%) of all eligible voters under the designation of the new party. In Pennsylvania, however, this option translates into the registration of over 1,000,000 voters under the new party's designation - a herculean if not unconstitutional burden itself, considering that even the most successful independent political parties are rarely able to register over three percent (3%) of the registered voter population.

Thus, Barkman and others similarly situated, are deprived of their fundamental right to participate in government by the combined stranglehold that Pennsylvania's statutory system places on all avenues of participation in government. The requirement of closed primary elections, combined with the elimination of other modes of participation in government, unconstitutionally eliminate and burden Barkman's fundamental right to participate in government.

CONCLUSION

This Court's strongest role since its creation by the people through the United States Constitution has been the safeguarding of individually guaranteed, constitutionally-derived rights. Special and expansive protection has been granted by this Court to individual rights determined to be fundamental rights, or those rights which serve as "attributes of citizenship under a free government." *United States v.*

Cruikshank, 92 U.S. 588, 591 (1875). The right to participate in government is the cornerstone of natural rights which secures all other rights guaranteed by the Constitution and Bill of Rights. This Court, through this case, has the opportunity to vindicate that essential, fundamental constitutional right by declaring that the Pennsylvania statute prohibiting non-partisan registered voters from participating in state sponsored primary elections unconstitutionally burdens, in combination with other Pennsylvania statutes, Barkman's fundamental right to participate in state and national government.

The Community Environmental Legal Defense Fund (CELDF)

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TABLE OF CONTENTS
Appendix to the Petition

Order,
In the Supreme Court of Pennsylvania
Western District
entered July 13, 1999 ..... App. 1

Opinion,
In the Commonwealth Court
of Pennsylvania
entered March 12, 1999 ..... App. 2

Order,
In the Commonwealth Court
of Pennsylvania
entered March 12, 1999 ..... App. 11

Order of Court,
In the Court of Common Pleas of
Bedford County, Pennsylvania
entered May 19, 1998 ..... App. 12

Transcript of Proceedings before
The Honorable Daniel Lee Howsare
on May 19, 1998 ..... App. 13

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: THE ORAL PETITION OF
ANNABELLE C. BARKMAN
REQUESTING THAT THE BEDFORD
COUNTY BOARD OF ELECTIONS BE
COMPELLED TO PERMIT HER TO
VOTE IN THE 1998 PRIMARY
ELECTION AS A NON-PARTISAN

ANNABELLE C. BARKMAN,
Petitioner

No. 259 W.D. Allocatur Docket 1999

Petition for Allowance of Appeal
from the Commonwealth Court

Entered: July 13, 1999

ORDER

PER CURIAM:

AND NOW, this 13th day of July 1999, the petition for allowance of appeal is denied.

A True Copy Patricia Honard
As of: July 13, 1999
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: THE ORAL PETITION OF ANABELLE C. BARKMAN REQUESTING THAT THE BEDFORD COUNTY BOARD OF ELECTIONS BE COMPELLED TO PERMIT HER TO VOTE IN THE 1998 PRIMARY ELECTION AS A NON-PARTISAN

ANNABELLE C. BARKMAN,
Appellant

NO. 1713 C.D. 1998
ARGUED: December 8, 1998

BEFORE: HONORABLE DORIS A. SMITH, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION BY JUDGE SMITH

FILED: March 12, 1999
ENTERED: March 12, 1999

Annabelle C. Barkman appeals from an order of the Court of Common Pleas of Bedford County that denied her oral petition to the trial court on primary election day to compel the local election board to permit her to vote on any available ballot, although she was registered as a non-partisan. Because Barkman was registered non-partisan, the judge of elections told her that she could not vote on either the Democratic or Republican primary ballot.[1] Barkman

[1] Barkman testified that the same thing happened the previous year. The only difference was that in 1997 she was offered no ballot at

questions whether Pennsylvania law governing primary elections unconstitutionally abridges the voting, associational and equal protection rights of electors registered non-partisan.

I.

The facts of this matter are simple and undisputed. Barkman went to the polling place in Monroe Township on May 19, 1998 to vote in the primary election; she requested that she be permitted to choose from among the ballots that were available that day. The county board of elections confirmed the information given by the local board that she could not vote on either the Democratic or Republican primary ballot, and Barkman then made contact with the President Judge, Daniel L. Howsare, who was performing election day duties. The trial court conducted a hearing on Barkman's oral petition and thereafter denied it.[2] The court concluded that Section 702 of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1933, *as amended*, 25 P.S. §2812, limiting the right to vote in any

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all, whereas in 1998 she was offered a ballot for some third party that had agreed to permit persons registered non-partisan to vote on its ballot. The ballot, however, was empty, and it would have been necessary to write in any choices.

[2] Barkman explained to the trial court that she was following the identical procedure as in the previous year because her appeal taken to this Court at that time had been dismissed as moot, and the Supreme Court had denied allowance of appeal. She wished to return to this Court prepared to challenge any suggestion of mootness. Although Barkman's present case also is technically moot - she cannot be afforded the relief she requested from the trial court of being permitted to vote on any available ballot in the 1998 primary election - the Court concludes that her challenge falls within exceptions to that doctrine for cases that are likely to recur yet escape judicial review and cases that involve matters of important public interest. *See Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131 (Pa. Cmwlth.), *appeal granted*, __ Pa. __, 719 A.2d 748 (1998).

party's primary elections to those registered as members of such party, did not violate Barkman's right of free association or right to vote and did not violate the principle of equal protection of the laws.

Barkman acknowledges at the outset that her case revisits the issue decided in *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn.) (three-member panel), *aff'd without opinion*, 429 U.S. 989 (1976), which upheld the constitutionality of a "closed" primary election. In *Nader* two individuals challenged the provision of Conn. Gen. Stat. §9-431 in effect at that time which prohibited any person from voting at a primary election of a party unless he or she was "on the last-completed enrollment list of such party in the municipality or voting district...". They contended that the statute infringed upon their rights to vote, to associate with others in support of a candidate and to enjoy equal protection of the laws. Section 702 of the Pennsylvania Election Code, relating to qualifications of electors at primaries, provides in part: "[N]o elector who is not registered and enrolled as a member of a political party, in accordance with the provisions of this act, shall be permitted to vote the ballot of such party or any other party ballot at any primary." The situation, therefore, was essentially identical to that presented here.

More recently, the same question was presented in the case of *Ziskis v. Symington*, 47 F.3d 1004 (9th Cir. 1995). There an individual elector contended that Arizona's closed primary pursuant to Ariz. Rev. Stat. §16-467(B), which provided that each voter in a primary election be given a ballot only of the party with which the voter is affiliated in the precinct register, violated the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals for the Ninth Circuit concluded that *Nader* was controlling. The court first observed that the elector was challenging the Arizona statute only as it applied to non-party, independent voters and that he sought to vote in the primary election of a party that had chosen to limit primary voting to members only. The case therefore was

"analytically distinct" from that presented in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

In *Tashjian* the Supreme Court held that enforcement of a closed primary statute was unconstitutional where the party sought to open the election. The Connecticut Republican Party adopted a rule permitting independent voters to vote in its primary election. As noted in *Ziskis*, the Supreme Court expressly stated in *Tashjian* that for claims by a nonmember of a party seeking to vote in a party's primary despite its opposition, "the nonmember's desire to participate in that party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualification." *Tashjian*, 479 U.S. at 216 n6 (citing *Rosario v. Rockerfeller*, 410 U.S. 752 (1973), and *Nader*).

The Supreme Court in *Timmons v. Twin Cities Area New Party*, __ U.S. __, __, 117 S. Ct. 1364, 1370 (1997), recited the applicable method of analysis:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. (Citations and internal quotations omitted.) [[3]]

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[3] At issue in *Timmons* was Minnesota's statute prohibiting "fusion" candidacies, that is, barring any candidate from appearing on the

II

The Court therefore turns to the precise nature of Barkman's asserted right and the burden imposed upon it. First, Barkman is not asserting a right of any registered voter to vote on all primary election ballots. By definition, as a registered non-partisan voter, she has standing to assert the rights of non-partisans, not the rights of persons registered with one party who might wish to vote in the primary of another party. In addition, she did not claim before the trial court a right to vote on the ballot of more than one party at the primary.[4] She asserts only that as a registered non-partisan, her claimed right to participate in the election that

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ballot as representing more than one political party. The Supreme Court concluded that the burden this provision placed on a minor party that wished to nominate the same candidate as a major party (with the candidate's consent) did not create a severe burden on the ability of the minor party or its members to endorse, support or vote for anyone they pleased and did not directly limit the party's access to the ballot. Compare Section 910 of the Election Code, 25 P.S. §2870, relating to affidavits of candidates, which requires a sworn statement that the candidate is not a candidate for nomination for the same office of any party other than the one designated in his or her petition, unless he or she is a candidate for judge of the court of common pleas or the Philadelphia Municipal or Traffic Courts or for the offices of school director or justice of the peace.

[4] The District Court in *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997), *aff'd*, __, F.3d__ (9th Cir., Nos. 97-17440 and 97-17442, filed March 4, 1999) (adopting trial court opinion), discussed the many variations that exist on "open" and "closed" primary elections. An "open" primary is one in which a registered voter may request on election day the ballot for any party's primary in which the voter intends to vote, regardless of previous registration, but the voter may vote in only one party's election. A "blanket" open primary, such as was adopted by the California electorate in approving Proposition 198 in March 1996, which was at issue in *California Democratic Party*, permits any registered voter to vote for any candidate of any party. A "semi-closed" primary is one where only party members or those registered non-partisan may vote in a party's primary. This describes the nature of Barkman's request to the trial court.

will determine the major-party candidates in the general election has been infringed.

Further, Barkman has never asserted that the requirements to become registered with a party that includes candidates for whom she might wish to vote are onerous. Under Sections 526 and 903 of the Pennsylvania Voter Registration Act, Act of June 30, 1995, P.L. 170, 25 P.S. §§961.526 - 961.903, the deadline in general for registering to vote or for changing registration is 30 days before the election. This Act also provides various convenient methods for registering, including submission of applications with an application for a driver's license, by mail or through numerous types of government agencies. Sections 523, 524 and 525, 25 P.S. §§961.523, 961.524 and 961.525. Barkman acknowledges the relative ease of the mechanics of registration, but she asserts that the Pennsylvania requirement results in disenfranchisement for the principled person who desires to have no public ongoing affiliation with a particular party.

The Court of Appeals in *Ziskis* relied upon *Nader* in addressing this issue, first pointing out that this asserted burden was a minimal infringement on the voter's rights to free association, to vote and to equal protection, which did not warrant strict review. The Court then stated:

> In *Nader*, as in this case, registering as a member of a party 'is not particularly burdensome, and it is a minimal demonstration by the voter that he has some "commitment" to the party in whose primary he wishes to participate'. [*Nader*, 417 F. Supp.] at 847. If the independent voter 'choose[s] not to associate, by not enrolling in a party, [his] right to vote in the general election is unaffected." *Id.*

Ziskis, 47 F.3d at 1006. The Court of Appeals went on to state that there was no showing that the voter was interested in nominating candidates who were most faithful to the policies and philosophies of the parties:

> Indeed, Ziskis's 'refusal to join any of the voluntary associations, which are organized for the purpose of effectuating their members' political goals, is fundamentally inconsistent with any claim that [he is] as "interested" as party members in the outcome of the party nominating process.' [*Nader*, 417 F. Supp.] at 848. *Thus, given the state's interest in protecting the associational rights of party members and in preserving the integrity of the electoral process, the state may legitimately allow political parties to close their primaries to nonmembers.*

Id. (emphasis added).

Barkman contends that she does not desire to participate in any party's affairs but to participate in the fundamental governmental activity of an election, at public expense, presumably for the general good. She asserts that the discussion in *California Democratic Party* indicates that state interests traditionally advanced in support of a closed primary are relatively insubstantial and do not justify intrusion on the voting rights of the independent voter. Barkman's reliance upon *California Democratic Party*, however, is misplaced. The crucial distinction between the present case and *California Democratic Party* is that in the latter the electorate as a whole, and by convincing margin cutting across all major party and demographic lines, had chosen the blanket primary as its preferred method when it adopted Proposition 198 in March 1996. The question there was whether such a system could withstand a constitutional

challenge by the political parties, which opposed it. The question was not whether the previous closed primary system was unconstitutional or whether the new system was constitutionally required.

In affirming the District Court's decision in *Nader*, the United States Supreme Court established controlling precedent that the type of interest advanced by Barkman does not outweigh the interests of political parties and of the state that are embodied in a duly enacted, closed method of conducting primary elections. The Supreme Court reaffirmed that precedent in *Tashjian*, and the Court of Appeals in *Ziskis* concluded that *Nader* controls in a case such as this.[5] This Court agrees with the Court of Appeals and therefore affirms the trial court's denial of Barkman's oral petition.

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[5] In a reply brief Barkman raises the additional argument that the District Court in *Nader* reviewed the entire framework established by Connecticut statutes for the conduct of primary and general elections in order to determine the "character and magnitude" of the asserted injury to the rights of the plaintiffs. She asserts that the provisions for a minor party to achieve a place on the ballot in Connecticut create far lower hurdles than comparable provisions in Pennsylvania. In *Nader*, she notes, the court responded to an argument that alternative avenues of political expression were ineffectual and unrealistic in part by pointing out in a footnote the successes over the years of candidates from other than the Republican and Democratic Parties in achieving both minor and major party status and in gathering the sufficient number of signatures to entitle them to be placed on the ballot for the general election. *Nader*, 417 F. Supp. at 843 n5. Barkman argues that this alleged difference fundamentally alters the "components of the equation" employed by the courts in *Nader* and *Tashjian*, with the result that what was a minimal burden in *Nader* has become a significant burden in the present case.

The Court does not agree. The holding in *Nader* was not premised upon liberal access to the ballot by minor parties. Barkman does not acknowledge that immediately following the footnote on which she relies the court stated that the dominant position of the Republican and Democratic parties did not result from discrimination in their favor from the state but rather resulted from their being successful, over a period of time, in attracting the bulk of the electorate.

/s/ Doris A. Smith
DORIS A. SMITH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: THE ORAL PETITION OF ANABELLE C. BARKMAN REQUESTING THAT THE BEDFORD COUNTY BOARD OF ELECTIONS BE COMPELLED TO PERMIT HER TO VOTE IN THE 1998 PRIMARY ELECTION AS A NON-PARTISAN

ANNABELLE C. BARKMAN,
Appellant

NO. 1713 C.D. 1998

Entered: March 12, 1999

ORDER

AND NOW, this 12th day of March, 1999, the order of the Court of Common Pleas of Bedford County is affirmed.

/s/ Doris A. Smith
DORIS A. SMITH, Judge

IN THE COURT OF COMMON PLEAS OF
BEDFORD COUNTY, PENNSYLVANIA

In re: The oral petition of Annabelle C. Barkman requesting that the Bedford County Board of Elections be compelled to permit her to vote in the 1998 Primary Election as a non partisan.

ORDER OF COURT

And now, May 19, 1998, the motion of Annabelle C. Barkman requesting an order of Court compelling the Board of Elections of Bedford County and the Board of Elections of Monroe Township to permit her to vote in the 1998 Primary Election as a non-partisan is hereby denied.

By the Court.

/s/ Daniel Howsare
P.J.

Counsel:

For the Bedford County Election Board:
Douglas R. Goldhaber, Esquire

Mrs. Barkman, Pro se

IN THE COURT OF COMMON PLEAS OF BEDFORD COUNTY, PENNSYLVANIA

In Re: The oral petition of Annabelle C. Barkman requesting that the Bedford County Board of Elections be compelled to permit her to vote in the 1998 Primary Election as a nonpartisan.

TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE DANIEL LEE HOWSARE

DATE: May 19, 1998

PLACE: Law Library
Bedford County Court House
Juliana Street
Bedford, Pennsylvania

Counsel:

For the Board of Elections:
Douglas R. Goldhaber, Esquire

Mrs. Barkman, Pro se

Bernadette Black
Court Reporter

THE COURT: I would like to indicate first for the record, that present at this time is Annabelle C. Barkman, that Attorney Douglas Goldhaber is present on behalf of the Board of Election of Bedford County.

Now, it's my understanding that a situation has occurred today which is like the situation that occurred last year on primary election day and that is, Mrs. Barkman, that you went to the Monroe Township precinct this morning to vote in the primary election, that you were refused the opportunity to vote, that you are registered nonpartisan.

MRS. BARKMAN: I was offered the opportunity for the one ballot that has no choice. There is three ballots offered today. I indicated to the Election Judge, Eric Rinard, that I wanted the choice of a ballot.

THE COURT: They offered to permit you to use the one ballot and it was your request that you be permitted to choose from the three, Republican, Democrat and - -.

MRS. BARKMAN: Last year, that's the difference from last year where there were only two, only the Republican and Democrat and I was offered none.

THE COURT: What was the other Ballot available?

MRS. BARKMAN: I don't have the copy with me. I went to Anna to ask what it was. I don't think - - it was some other party and that party evidently it indicated nonpartisan could take that ballot but there is nothing on it. They have to write it in.

THE COURT: The party itself, I think that really is the point that came up in these cases that we came through that the party itself with regard to that ballot was willing to have non partisan but even they didn't allow for any registered voter of any political preference to take theirs only the non-partisan could.

MRS. BARKMAN: Nonpartisan could.

THE COURT: What you're asking is that you be permitted to choose the ballot and you were denied that opportunity?

MRS. BARKMAN: Yes, sir.

THE COURT: Then you contacted the Bedford County Election Board and I think you indicated two members you indicated Mr. Rice and Ms. Ickes.

MRS. BARKMAN: Correct and Anna Hinish the Election Board Registrar.

THE COURT: The decision there basically they gave you the same answer as Mr. Rinard at the board of election in Monroe Township. I take it then you are here at this time to ask for an order ordering that you be permitted to - - permitted, I guess, to vote on the ballot of your choosing at this primary election.

MRS. BARKMAN: Yes, sir.

THE COURT: You agree, Mr. Goldhaber, and to some extent I assume you are familiar with this?

MR. GOLDHABER: I'm familiar with the situation as it occurred last year. As the attorney for Bedford County Board of Election, I do agree with the decision made by Mr. Rice, Ms. Ickes and Mr. Rinard's decision. I do agree.

THE COURT: Do you have anything you would like to present that is different from last year that pertains to this issue? I think and I haven't looked at this since last year, I think that situation was based on the Nader case and there was another one - - the Tashijian, T-a-s-h-i-j-i-a-n. And essentially it had to do with the right of association, the distinction is the political party can decide people other than people of their affiliation to vote in their primary, but those people didn't have the right to force that on the political party that is what it boiled down to.

MRS. BARKMAN: That seemed to be what it did. As far as citing cases, I don't have any. I only feel strongly - - I know there is some precedent if you are disenfranchised at the primary they are disenfranchised also and my position is not only I, as a non-partisan have a disenfranchise issue

my position is those who are registered with either of the two major parties also are disenfranchised to a degree, fifty percent, they don't have a choice of a ballot either.

One of the reasons I'm pursuing this back through this same channel this year when it went to the Commonwealth Court it was not heard because it was considered moot and my attorney last year researched the question of mootness and I was sent in a letter saying that the Commonwealth Court only if the issues involved are of a recurring nature, of important public interest and capable of repeatedly evading review will we refuse to dismiss and the case was Goldsmith vs. Lower Moreland School District. So my concern was that this is a reoccurring issue the primary that comes up every year and it is of important public interest and it is capable of repeatedly evading review.

THE COURT: But I think that goes more, quite frankly, I see no alternative from my decision last year denying your request. I think what you are talking about goes to whether or not the Commonwealth Court will entertain an appeal.

MRS. BARKMAN: I agree.

THE COURT: That's not really germane to the issue here.

MRS. BARKMAN: I just wanted you to understand why I'm attempting one more time to go through this channel.

THE COURT: Do you have anything else you want to include?

MRS. BARKMAN: I appreciate your patience with this.

THE COURT: I'll enter and order then for the same reason that I entered the order last year and deny your request that the Bedford County Board be compelled to permit you to vote in the 1998 Primary Election as a non-partisan, and particularly in this case that you be permitted to vote on the ballot of your choosing.

MRS. BARKMAN: May I request a copy of the court reporter transcript that I can purchase when it is available?

THE COURT: I'll have an order typed up and you'll receive a copy of that. And then also, get Mrs. Barkman's address so we can have a copy of the transcript sent to her. The Order will be as follows:

And now, May 19, 1998, the motion of Annabelle C. Barkman requesting an order of Court compelling the Board of Elections of Bedford County and the Board of Elections of Monroe Township to permit her to vote in the 1998 Primary Election as a non-partisan is hereby denied. By the Court.

And again for the record, this order is made in the context of your going to vote and your asking to vote on a ballot of your choice.

(Court is in recess.)

I hereby certify that this is a correct transcript of the proceedings, evidence and notes of testimony taken by me at the hearing of the above matter.

/s/ Bernadette Black
Court Reporter

May 19, 1999
Date

The foregoing record of the proceedings upon hearing of the above cause is hereby approved and directed to be filed.

/s/ Daniel Howsare
P.J.